

**STAFF REPORT  
INFORMATIONAL  
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**INFORMATIONAL REPORT ON EFFORTS TO INCREASE TRANSPARENCY IN THE  
COMMISSION'S CLOSED SESSION AGENDA, DISCUSSIONS AND DECISIONS**

The Bagley-Keene Open Meeting Act contained in Government Code sections 11120 through 11132 governs the meetings of state bodies including the Commission. State bodies generally must conduct public business openly, but closed session discussions are allowed in limited circumstances. These closed session discussions allow a state body, such as the Commission, to obtain legal advice or have other discussions in private<sup>1</sup> where doing so in public would prejudice the state. For example, Government Code section 11126(c)(7) authorizes conference with negotiators prior to the purchase, sale, or exchange, or lease of land regarding the price and terms of payments. These closed session discussions are permitted because it would seriously prejudice the state during a purchase negotiation if it were forced to publicly disclose the highest value it would pay for land it is trying to acquire. Similarly, Government Code section 11126(e) allows a state body to receive legal counsel regarding pending litigation because public disclosure of the Commission's attorney-client communications or of legal strategy during litigation would unfairly handicap the state's ability to present an effective case.

While the Bagley-Keene Act permits the Commission to hold closed session discussions, the Commission has directed staff to explore options to increase the transparency and reporting with regard to closed sessions. While it would be impractical and prejudicial to hold these discussions in open session, the options presented below to reorganize and increase reporting of closed session activity will make it easier for members of the public to stay informed of Commission actions.

**List Specific Items to be Discussed**

The Commission currently lists all active litigation under the closed session heading of the agenda. This provides notice to the public that the Commission may seek advice from its attorneys regarding any of these ongoing cases. However, the Commission rarely discusses all of these listed matters at any particular meeting. To increase transparency, the Chief Counsel will identify the specific matters listed on the agenda that staff intends to present to the Commission just prior to going into closed session. If discussions concerning one of the other noticed matters occur, the Chief Counsel will

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<sup>1</sup> The Bagley-Keene Open Meeting Act provides for a number of other closed session discussions, but these are beyond the scope of this staff report.

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report on returning to open session that these discussions occurred. This way, the public is aware of what matters the Commission is considering in closed session, without disclosing the specific confidential legal advice sought or obtained.

### Conduct Vote in Open Session

After receiving legal advice in closed session, the Commission may have an action to take. In some cases, it may be possible to vote in open session without prejudice to the state's position. Whether it would be appropriate to vote in open session is a case-by-case determination that would depend on the facts of the case. The Commission could consider, in closed session and in consultation with its attorneys, whether conducting the vote in open session would result in prejudice to the state. Where the Commission determines that there is no prejudice to the state, the Commission could vote in open session.

### The Executive Officer May Report on a Closed Session Vote

In some cases, an open session vote could prejudice the state. For example, there may be a considerable delay between the time the Commission authorizes staff to file a lawsuit and notifying the defendant of the lawsuit. It takes time to secure the services of and fully consult with the Attorney General's Office and to initiate the litigation.

In some cases, this delay between publicly announcing the intent to litigate and the initiation of the litigation will prejudice the state's position. In some cases, this advanced notice could prompt the potential defendant to evade service of process, hide assets that might satisfy a judgment, or cause waste to property. In other instances, the subject matter of a vote would be inappropriate to disclose until some future time. For these votes, the Commission would vote in closed session and, after there is no danger of prejudice, the Commission could direct the Executive Officer to make public disclosure of the votes or actions.

In order to illustrate the prior two suggestions, consider a case where the Commission must decide whether to file suit against a trespasser. The Commission could obtain legal advice in closed session about the merits of the case and other strategic issues. Then the Commission could consider whether there is any reason that a public vote would prejudice the state's position. If a public vote would not prejudice the state, the Commission may return to open session for the vote. If a public vote would prejudice the state, then the Commission could direct the Executive Officer to report on the vote after the lawsuit is filed and there is no longer prejudice to the state.

### Include an Open Session Staff Report

The Commission's agenda lists the items that may be discussed in closed session. However, it might be easier for members of the public to follow the Commission's activities if the anticipated closed session items include an informational staff report on the open session agenda. This staff report could include a summary of relevant non-

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confidential background or other information useful to understanding a potential decision. Confidential information would still be addressed only in closed session.

Including a staff report on the open session agenda would have several advantages. It will be easier for members of the public to follow the Commission's actions and make informed comments on the matters being considered in closed session. It will also make it easier to track and report on discussions held in closed session if the Commission decides to do so. The numbered staff reports could be referenced when disclosing the results of votes or topics discussed in closed session if the Commission decides to do so. Commission staff is exploring opportunities to implement this option for the next Commission meeting tentatively scheduled for November 29, 2017.

### Conclusion

The options above reflect the commitment of the Commission and its staff to examine each matter presented to the Commission on a case-by-case basis to maximize transparency. These minor modifications to reporting on closed session considerations could make it easier for members of the public to stay informed and participate in the Commission's actions.